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No. 03-1562

In the Supreme Court of the United States

HCA INC. & SUBSIDIARIES, SUCCESSORS TO HOSPITAL CORPORATION OF AMERICA & SUBSIDIARIES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 26 U.S.C. 448(d)(5) (Supp. IV 1986), a taxpayer using the accrual method of accounting was not required to accrue as income any portion of amounts to be received for services rendered which, on the basis of experience, would not be collected. Pursuant to its authority under 26 U.S.C. 7805(a) to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code, the Department of the Treasury issued and then amended a temporary regulation specifying a formula under which the uncollectible portion of accounts receivable was to be calculated. The question presented is as follows:

Whether 26 C.F.R. 1.448-2T(e)(2)(i) (1989) constituted a valid exercise of the Treasury's rulemaking authority under 26 U.S.C. 7805(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 348 F.3d 136. The opinion of the Tax Court (Pet. App. 21a-62a) is reported at 107 T.C. 116.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2003. A petition for rehearing was denied on February 17, 2004 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on May 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the accrual method of accounting, a taxpayer is required to recognize income in the year in which the taxpayer's right to receive an amount has been fixed, even if the amount has not yet been collected. See 26 C.F.R. 1.446-1(c)(1)(ii). The accrual method thus requires a taxpayer to treat year-end accounts receivable as income. Because a portion of those receivables may ultimately be determined to be uncollectible "bad debts," however, a taxpayer using the accrual method has been allowed to account up front for the possibility that a certain percentage of its outstanding receivables will ultimately not be collected.

a. Prior to 1986, a taxpayer could establish a reserve for bad debts and make annual deductions for additions to that reserve. See 26 U.S.C. 166(c) (1982). A taxpayer using the reserve method would estimate its future losses resulting from debts outstanding at the close of each taxable year. The taxpayer was permitted, but not required, to calculate its future losses by using a formula first approved in *Black Motor Co.* v. *Commissioner*, 41 B.T.A. 300 (1940), aff'd on other grounds, 125 F.2d 977 (6th Cir. 1942). Under the *Black Motor* formula, future losses were estimated by multiplying a taxpayer's total year-end receivables by a ratio of the taxpayer's total bad debts over the last six years (including the current year) to the sum of the taxpayer's year-end receivables over the last six years. See 41 B.T.A. at 302. This Court ultimately sanctioned the use of the *Black Motor* formula, though it recognized that the formula could lead to unreasonable results in some cases. *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 547-550 (1979).

b. As part of its overhaul of the tax laws in 1986, Congress repealed the provision establishing the reserve method. Tax Reform Act of 1986, Pub. L. No. 99-514, § 805(a), 100 Stat. 2361. Congress acted out of concern that it was inconsistent with the treatment of other deductions under the accrual method to allow a taxpayer to make a deduction for a loss that would occur in the future, since the deduction would be larger than the present value of the loss. H.R. Rep. No. 426, 99th Cong., 1st Sess. 577 (1985); S. Rep. No. 313, 99th Cong., 2d Sess. 155 (1986). Congress, however, did create a narrow exception for taxpayers that provide services. Specifically, Congress established the so-called "nonaccrual-experience" method, under which a taxpayer using the accrual method could make an adjustment to its income to account for "any portion of * * * amounts [to be received for services rendered] which (on the basis of experience) will not be collected." 26 U.S.C. 448(d)(5) (Supp. IV 1986). Eight months later, the Department of the Treasury promulgated a temporary regulation that required a taxpayer to use the *Black Motor* formula in calculating the amount of any adjustment under Section 448(d)(5)—namely, by multiplying its year-end receivables by a ratio of its total bad debts over the last six years to the sum of its year-end receivables over the last six years. 26 C.F.R. 1.448-2T(e)(2)(i) (1988).[1] If the taxpayer was subsequently able to collect on an account, it was required to report the amount of any previous adjustment on the

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[1] The statute and temporary regulation imposed certain requirements concerning the types of receivables for which an adjustment could be obtained. 26 U.S.C. 448(d)(5) (Supp. IV 1986); 26 C.F.R. 1.448-2T(c)-(d) (1988). It is undisputed that petitioners met those requirements. See Pet. App. 29a.

account as income, see 26 C.F.R. 1.448-2T(e)(3) (1988); if not, it could deduct the previously accrued portion of the account as a bad debt, see 28 U.S.C. 166(a).[2]

c. The Treasury soon became aware of two problems with the temporary regulation. First, taxpayers had expressed confusion as to whether the denominator in the ratio to be used in calculating the income adjustment was the sum of the *year-end balances* of their accounts receivable over the last six years, or the total of their accounts receivable (that is, the total amount of sales) over the same period. See 53 Fed. Reg. 12,513 (1988). Second, the Treasury expressed concern that, to the extent that taxpayers were using the sum of their year-end receivables as the denominator, some taxpayers were taking advantage of an artificially high ratio—particularly in industries, such as the utilities industry, in which bad debts are routinely written off in less than a year (and therefore are frequently not included in the sum of year-end receivables). See, *e.g.*, *Practitioners Say Proposed Ratio for Bad Debts Does Not Reflect Experience*, Daily Tax Rep. (BNA) No. 232, at G-3 (Dec. 2, 1988) (quoting remarks of Thomas Evans, Associate Tax Legislative Counsel, Department of the Treasury). Ten months after promulgating the temporary regulation, therefore, the Treasury amended

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[2] The temporary regulation required a taxpayer to apply the nonaccrual-experience method on an account-by-account basis. 26 C.F.R. 1.448-2T(e)(3) (1988). Subsequently, however, the Treasury allowed a taxpayer to use a periodic system, under which the taxpayer establishes a global account representing the amounts that it estimates will be uncollectible on all of its accounts. See I.R.S. Notice 88-51, 1988-1 C.B. 535. The periodic system is similar in operation to the preexisting reserve system. Under either the account-by-account or periodic system, the taxpayer is required to use the same ratio in calculating its income adjustment.

it in order to require that taxpayers use the total of their accounts receivable over the last six years, rather than the sum of the year-end balances of their accounts receivable, as the denominator in the ratio. 26 C.F.R. 1.448-2T(e)(2)(i) (1989).

2. Petitioners are a company that owns and operates hospitals, and its subsidiaries. As a result of the 1986 Tax Reform Act, most standard corporations (or "C corporations"), including all of the petitioners, were required to use the accrual method of accounting. See 26 U.S.C. 448(a) (Supp. IV 1986); 26 U.S.C. 1361(a)(2). Petitioners duly adopted the accrual method from tax year 1987 forward, and also elected to take advantage of the nonaccrual-experience method in order to obtain an income adjustment for their hospital-related services. Pet. App. 24a-25a. Instead of calculating their adjustments for tax years 1987 and 1988 according to the formula contained in the amended regulation, however, petitioners used the *Black Motor* formula. C.A. App. 427.[3] Upon an audit, the Commissioner of Internal Revenue concluded that petitioners had overstated the excludable amount of their receivables by using the *Black Motor* formula, and thus assessed deficiencies. Petitioners challenged the deficiencies in the Tax Court, claiming, *inter alia*, that the amended regulation was invalid.

3. The Tax Court ruled in favor of respondent and upheld the amended regulation. Pet. App. 21a-62a. Applying the familiar framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467

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[3] Petitioners did not contend that the amended regulation was inapplicable, but rather only that it was invalid. Cf. 53 Fed. Reg. 12,513 (1988) (noting that the amended regulation was effective for all taxable years beginning after December 31, 1986).

U.S. 837 (1984), the court first rejected petitioners' contention that Section 448(d)(5), the statute interpreted by the amended regulation, was unambiguous. Pet. App. 37a-42a. The court reasoned that the statutory phrase "on the basis of experience" was in fact ambiguous because it did not provide "a clear mechanism for determining how a taxpayer's bad debt experience will be utilized to calculate the uncollectible portion of a receivable." *Id.* at 39a-40a. The court added that "[t]he statute on its face * * * provides no formula for calculating that amount." *Id.* at 40a. And the court expressly rejected petitioners' argument that the term "experience" "has a predetermined meaning which prescribes the formula that must be used to calculate the uncollectible portion of an amount owed a taxpayer." *Ibid.* The court reasoned that, if Congress had intended the term "experience" to require use of the *Black Motor* formula, it would have specifically referred to "the experience method" or "the *Black Motor* formula." *Id.* at 42a.

Turning to the legislative history of Section 448(d)(5), the Tax Court concluded that the only relevant history, the House Report to the 1986 Tax Reform Act, did not provide any "clear indication of congressional intent." Pet. App. 44a. The court noted that the House Report specified two "somewhat" differing formulas to be used in calculating the amount of any adjustment—a fact that suggested only that "Congress intended eligible taxpayers to employ a method to determine statistically the uncollectible amount that was similar, but not identical, to the *Black Motor* formula." *Ibid.*

Finally, the Tax Court concluded that the amended regulation constituted a reasonable interpretation of Section 448(d)(5). Pet. App. 44a-54a. The court squarely rejected petitioners' contention that the

amended regulation was defective because it did not use the *Black Motor* formula. *Id.* at 47a. It observed that the ratio used in the formula in the amended regulation was consistent with the ratio used in the formulas described in the House Report. *Id.* at 49a. The court also rejected petitioners' contention that "the result under the amended formula [was] not determined on the basis of the hospitals' experience." *Id.* at 52a. The court noted that "[t]he formula utilizes the bad debt history and accounts receivable of the hospitals, not some fictional entity." *Ibid.* It reasoned that, although the legislative history was somewhat ambiguous regarding the specific formula to be used, the House Report "suggest[ed] a congressional preference for a fixed formula for calculating the uncollectible amount." *Ibid.* The court recognized that the *Black Motor* formula was a "conceivable" method for calculating the uncollectible amount, and was "perhaps even a better choice," but added that it was not the only possible method and was not even one of the two formulas described in the House Report. *Id.* at 52a-53a. Because "[t]he amended formula * * * effectuate[d] the purpose of the statute," the court concluded, the Treasury's construction of the statute was permissible. *Id.* at 54a.

4. The court of appeals affirmed. Pet. App. 1a-20a. As a preliminary matter, the court of appeals agreed with the Tax Court that the Treasury's amended regulation was entitled to full *Chevron* deference. *Id.* at 6a-9a. Turning to the first step of the *Chevron* analysis, the court noted that "Section 448(d)(5) does not mandate any formula or provide guidance on computing the exclusion from income, only stating that the computation be made 'on the basis of [the] experience' of a taxpayer." *Id.* at 10a. After tracing the history of

Section 448(d)(5) and the Treasury's initial and amended regulations, the court agreed with the Tax Court that Section 448(d)(5) was ambiguous. *Id.* at 13a.

As to the second step of the *Chevron* analysis, the court of appeals held that the Treasury's amended regulation constituted a reasonable interpretation of Section 448(d)(5). Pet. App. 14a. Based on its review of the legislative history and the Treasury Decisions promulgating the initial and amended regulations, the court concluded that "the Treasury did not act arbitrarily but selected a reasonable method to measure accounts that should not be accrued from experience." *Ibid.* Finally, the court rejected petitioners' contention that the amended regulation was not entitled to *Chevron* deference in the wake of *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). Pet. App. 15a-16a. The court reasoned that, although the amended regulation was temporary and therefore did not go through notice-and-comment rulemaking, it was "arrived at centrally by the Treasury Department, after careful consideration," and was issued pursuant to the Secretary's general rulemaking authority under 26 U.S.C. 7805(a). Pet. App. 16a. The court concluded that "[t]he Secretary did not act in an unreasonable or arbitrary manner by employing a formula from the legislative history that he thought would effectuate the statutory mandate." *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

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[4] The court of appeals also rejected petitioners' challenge to the Commissioner's refusal to allow petitioners to spread certain tax adjustments over a ten-year period. Pet. App. 16a-20a. That holding is not challenged in the petition.

another court of appeals. Moreover, because the regulation at issue has since been superseded, this case presents a question of diminishing significance. Further review is therefore not warranted.

1. Petitioners do not contend that the court of appeals' holding conflicts with decisions of this Court or of other courts of appeals with respect to the specific question presented by this case—*i.e.*, whether the amended regulation, 26 C.F.R. 1.448-2T(e)(2)(i) (1989), constituted a valid exercise of the Treasury's rulemaking authority. Indeed, the Tax Court specifically recognized that this question is "one of first impression." Pet. App. 33a. Petitioners identify no cases involving other taxpayers in which the amended regulation, or the temporary regulation currently in effect, has been subject to challenge.

2. Instead, petitioners contend (Pet. 22-26) that the court of appeals erred by holding that the amended regulation was valid. That claim lacks merit.

a. Petitioners assert (Pet. 22-23) that the amended regulation was invalid under the first step of the *Chevron* analysis because Section 448(d)(5) "made crystal clear that any formula (or other approach) prescribed by the Treasury 'shall not' require the taxpayer to accrue any portion of the amount that its experience indicated it would not collect" (Pet. 23). Section 448(d)(5) provided that a taxpayer that provides services "shall not be required to accrue any portion of * * * amounts [to be received for services rendered] which (on the basis of experience) will not be collected." 26 U.S.C. 448(d)(5) (Supp. IV 1986). In requiring the amount of any income adjustment to be calculated "on the basis of experience," Section 448(d)(5) did contemplate that the amount would be based on the experience of the particular taxpayer at issue. As the court of

appeals correctly observed (Pet. App. 13a), however, Section 448(d)(5) was simply silent as to the *manner* in which a taxpayer's experience should be taken into account in determining the amount of any adjustment. Although it is true, as petitioners note (Pet. 23), that Section 448(d)(5) "did not specify the use of a particular 'intended formula' or any formula at all," it does not follow that Section 448(d)(5) unambiguously precluded the Treasury from mandating a formula to be used in calculating any adjustment—much less that Section 448(d)(5) unambiguously authorized a taxpayer to choose its own method for calculating the adjustment.

b. Petitioners allege (Pet. 23) that the formula contained in the amended regulation understated the amount of debt that petitioners would ultimately find to be uncollectible. At bottom, however, that contention goes not to whether the statute being interpreted by the regulation was unambiguous, but instead to whether the regulation itself constituted a reasonable interpretation of the statute. The mere fact that the regulation may have underestimated the amount of bad debt in petitioners' case (and, for that matter, may even have overestimated the amount of bad debt in other cases) does not demonstrate that the formula chosen by the Treasury is unreasonable, since "[v]irtually *every* legal (or other) rule has imperfect applications in particular circumstances." *Barnhart* v. *Thomas*, 124 S. Ct. 376, 382 (2003). Nothing in Section 448(d)(5) required that the Treasury calculate a taxpayer's bad debt with a greater degree of precision.[5]

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[5] To the extent that the formula contained in the amended regulation underestimated the amount of debt that a particular taxpayer would ultimately determine to be uncollectible, any attendant unfairness was ameliorated by the fact that the taxpayer

c. Petitioners' contention (Pet. 24) that the court of appeals "turned the normal canons of construction on their heads" by relying on the legislative history of Section 448(d)(5) similarly does not withstand scrutiny. The court of appeals did not base its holding that Section 448(d)(5) was ambiguous on the legislative history, but instead relied on the legislative history only in concluding that the amended regulation constituted a reasonable interpretation of that statute. Pet. App. 14a; see, *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704-708 (1995) (considering legislative history at second step of *Chevron* analysis). Moreover, notwithstanding petitioners' suggestion to the contrary (Pet. 24-25), the legislative history supports the Treasury's interpretation. The only relevant legislative history, the House Report to the 1986 Tax Reform Act, suggests that a single formula should be used in all cases. H.R. Rep. No. 426, 99th Cong., 1st Sess. 608 (1985). Although the House Report (seemingly inadvertently) sets out two different formulas, one of those formulas was precisely the formula used in the amended regulation, and both used the same ratio as the formula in the amended regulation (and a different ratio from that in the *Black Motor* formula). *Ibid.*[6] Thus, while the legislative history does

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could eventually deduct the amount of any underestimation once its debt was written off. See 28 U.S.C. 166(a).

[6] The House Report initially specified that the amount of any adjustment should be "the total amount billed, multiplied by a fraction whose numerator is the total amount of such receivables which were billed and determined not to be collectible within the most recent five years * * * and whose denominator is the total of such amounts billed within the same five year period." H.R. Rep. No. 426, 99th Cong., 1st Sess. 608 (1985). In a subsequent example, the House Report used the same ratio, but multiplied it

not demonstrate that Congress mandated the use of the formula contained in the amended regulation, it does support the court of appeals' conclusion that the Treasury's choice of that formula was reasonable.[7]

3. Although petitioners do not contend that the courts of appeals are in conflict concerning the validity of the amended regulation, they do assert (Pet. 13-22) that this Court's review is warranted in order to resolve a more abstract conflict as to whether a court reviewing an interpretive Treasury regulation should consider certain factors discussed in *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979), in determining whether the regulation is reasonable. That contention is also meritless.

a. Petitioners failed to argue to the panel below that it should apply the *National Muffler Dealers* factors in reviewing the amended regulation. Instead, petitioners argued that, in light of this Court's decision in *Mead*, the amended regulation was not entitled to *Chevron*

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by the total year-end receivables (rather than the total amount billed). *Ibid.* The latter formula was adopted in the amended regulation.

[7] Citing other portions of the legislative history, petitioners contend (Pet. 25 & n.10) that the drafters of the House Report intended to describe the *Black Motor* formula, rather than the formula ultimately adopted in the amended regulation. These excerpts, however, are equally susceptible of the opposite interpretation. And in any event, even if petitioners' speculative assumption about the real intent of the drafters of the House Report were accurate, the result would be the same, because the mere fact that the legislative history did not contain the precise formula adopted by the Treasury would not render that formula unreasonable. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 189-190 (1991) (noting that "[i]t is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations").

deference but instead was entitled only to the lesser degree of deference required by *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). See Pet. C.A. Br. 25-31; Pet. C.A. Reply Br. 15-20. Indeed, petitioners did not so much as cite *National Muffler Dealers* in their opening or reply briefs below.[8] As a result, the court of appeals did not address the *National Muffler Dealers* factors, much less any alleged distinction between the *Chevron* and *National Muffler Dealers* standards of review. Accordingly, the question whether a reviewing court should consider the *National Muffler Dealers* factors was not properly preserved for this Court's review. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

b. The conflict alleged by petitioners is illusory in any event. This Court has long recognized that interpretive regulations issued by the Treasury are entitled to great deference, in light of the broad nature of the delegation of rulemaking authority under 26 U.S.C. 7805(a) and the extraordinary complexity of the Internal Revenue Code's provisions. *E.g.*, *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967). In *National Muffler Dealers* itself, far from requiring "a more searching review" (Pet. 14, 17) or a "greater degree of scrutiny" (Pet. 18), the Court merely reiterated the settled principle that "[t]he choice among reasonable interpretations is for the Commissioner [of Internal Revenue], not the courts." 440 U.S. at 488. It was against that backdrop of deference that the Court listed

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[8] Petitioners did rely on *National Muffler Dealers* in their rehearing petition, which was denied without dissent. See Pet. App. 63a-64a.

a number of factors that may be relevant in determining whether a regulation "implement[ed] the congressional mandate in some reasonable manner." *Id.* at 476 (citations omitted). Specifically, the Court suggested that a reviewing court should look to "the plain language of the statute, its origin, and its purpose," and may also consider (1) the manner in which the regulation evolved, including whether the regulation constituted a "substantially contemporaneous" construction of the statute; (2) the length of time the regulation has been in effect; (3) the reliance placed on the regulation; (4) the consistency of the Treasury's interpretation; and (5) the degree of scrutiny devoted by Congress to the regulation during subsequent re-enactments of the statute. *Id.* at 477.

Petitioners contend (Pet. 16-17) that the Sixth Circuit, unlike the "overwhelming majority" of other circuits, has "squarely rejected use of the *National Muffler* factors as contrary to *Chevron*" (Pet. 17) (citing *Peoples Fed. Sav. & Loan Ass'n* v. *Commissioner*, 948 F.2d 289, 304 (6th Cir. 1991)). In its earlier decision in *Peoples Federal*, however, the Sixth Circuit did not suggest that the *National Muffler Dealers* factors should not be considered in evaluating a regulation's reasonableness, but instead merely criticized the Tax Court for construing *National Muffler Dealers* to allow for "plenary review of the legislative history" of the statute at issue. *Ibid.* The Sixth Circuit's decision in *Peoples Federal* is therefore not inconsistent with the other decisions cited by petitioners (Pet. 16-17), all of which, like the Sixth Circuit, apply a deferential standard in reviewing the Treasury's interpretive regulations.

c. Although no courts of appeals have expressly rejected the use of the *National Muffler Dealers* factors,

some have suggested that *National Muffler Dealers*, which predated *Chevron*, articulated the specific standard of deference for interpretive Treasury regulations using somewhat different terminology than the general standard of deference for agency interpretations articulated in *Chevron* itself. *E.g.*, *Bankers Life & Cas. Co.* v. *United States*, 142 F.3d 973, 981 (7th Cir.) (noting certain differences in *Chevron* and *National Muffler Dealers* formulations), cert. denied, 525 U.S. 961 (1998). As the Seventh Circuit concluded in *Bankers Life*, however, "they both come down to one operative concept—reasonableness," and thus "the supposed gap between *Chevron* and the traditional rule is a distinction without a difference." *Id.* at 981-982.[9]

Even if there were any theoretical uncertainty concerning the precise interplay between *Chevron* and *National Muffler Dealers*, moreover, this case would present a poor vehicle for resolving it. Contrary to petitioners' suggestion (Pet. 17-20), application of the *National Muffler Dealers* factors would not lead to a different result here. The ultimate question under the *National Muffler Dealers* formulation is whether the regulation "implement[s] the congressional mandate in

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[9] In its post-*Chevron* cases considering the validity of the Treasury's interpretive regulations, this Court has not recognized any inconsistency between *Chevron* and *National Muffler Dealers*. *E.g.*, *Boeing Co.* v. *United States*, 537 U.S. 437 (2003); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001). See also *Central Pa. Sav. Ass'n* v. *Commissioner*, 104 T.C. 384, 392 (1995) ("[W]e are inclined to the view that the impact of the traditional, i.e., *National Muffler* standard, has not been changed by *Chevron*, but has merely been restated in a practical two-part test with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation."), supplemented by 71 T.C.M. (CCH) 2724 (1996).

some reasonable manner." 440 U.S. at 476 (citations omitted). The court of appeals correctly concluded that the regulation is a reasonable implementation of Congress's enactment, see pp. 9-12, *supra*, and the various factors mentioned in *National Muffler Dealers* do not undermine that conclusion in any way. The Treasury issued the original version of the temporary regulation within months of the statute it was interpreting. See 52 Fed. Reg. 22,777 (1987). And although the Treasury did amend the regulation, it did so almost immediately thereafter, see 53 Fed. Reg. 12,514 (1988), and, after receiving comments and holding a hearing on the amended regulation, see *id.* at 12,534-12,535, applied it consistently for almost 15 years. In light of these facts, the *National Muffler Dealers* factors provide no basis for declining to defer to the Treasury's regulation.

4. Finally, the question presented in this case is of diminishing significance because the regulation at issue has since been superseded. In 2002, Congress directed the Treasury to prescribe regulations that enable taxpayers to "determine amounts [of Section 448(d)(5) adjustments] using computations or formulas which, based on experience, accurately reflect the amount of income that will not be collected by such person," and to allow taxpayers to use formulas of their own where appropriate. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 403(a), 116 Stat. 40-41 (to be codified at 26 U.S.C. 448(d)(5)(C)).[10] In response to this amendment, the Treasury issued a new temporary regulation that establishes alternative formulas, including four "safe harbor" formulas, that may be elected by

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[10] Congress made the amendments to Section 448(d)(5) effective only prospectively. See Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 403(b), 116 Stat. 41.

taxpayers. See 26 C.F.R. 1.448-2T(e). Moreover, the Treasury is currently in the process of promulgating a final regulation. See 68 Fed. Reg. 52,499 (2003). Because petitioners have identified no cases brought by other taxpayers involving the version of the temporary regulation applicable to them, and because that version differs sufficiently from the current version that a decision on the validity of the former would have little or no bearing on the validity of the latter, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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